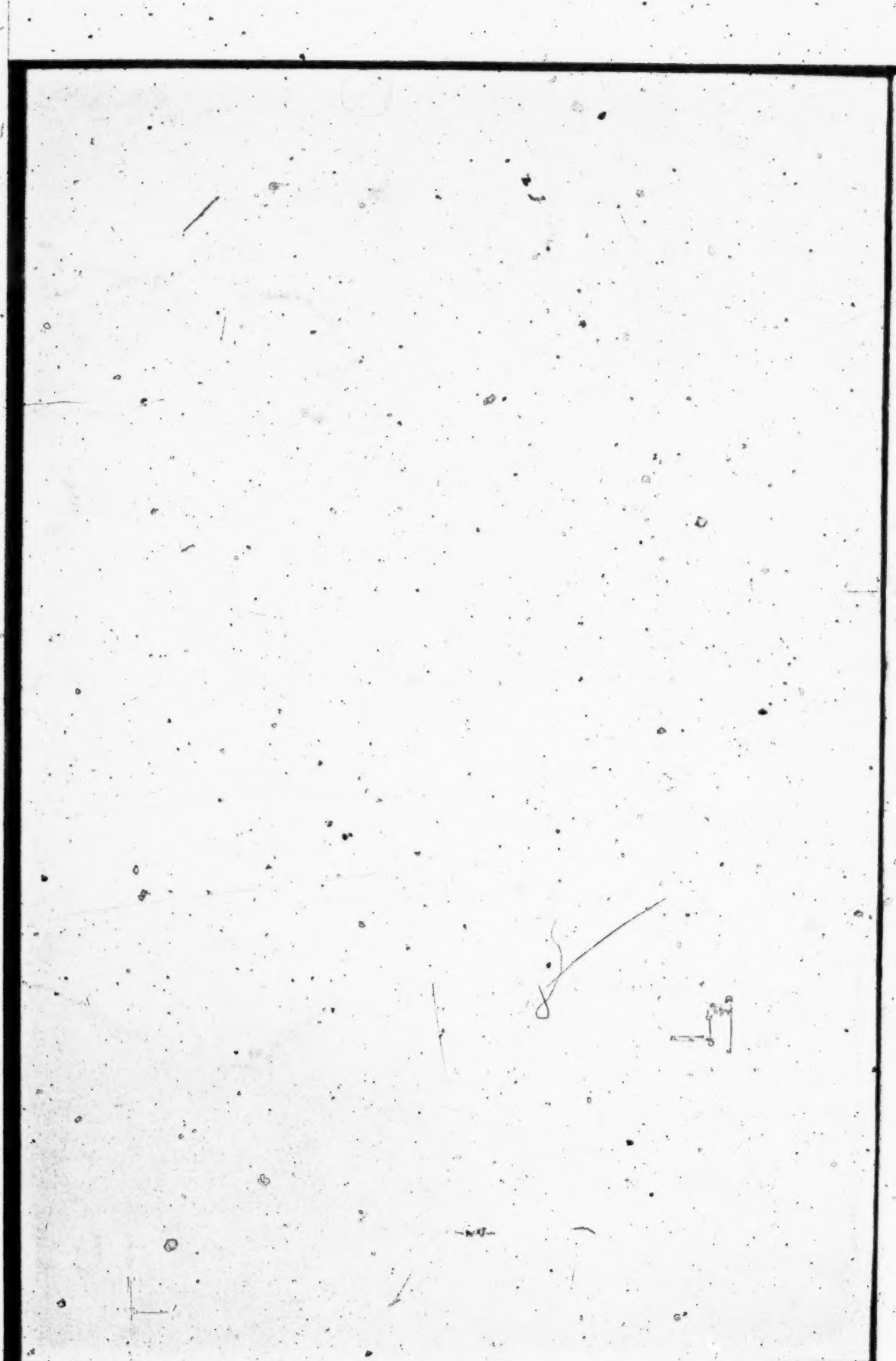


SUPREME COURT, U. S.
FEB 11 1967
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Supreme Court of the United States

OCTOBER TERM, 1966

No. 647

LOUIS BOSTICK, PETITIONER,

versus

STATE OF SOUTH CAROLINA AND ELLIS C. MACDOUGALL, DIRECTOR, SOUTH CAROLINA BOARD OF CORRECTIONS, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF FOR RESPONDENTS

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OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported as *Bostick v. State*, 247 S. C. 22, 145 S. E. (2d) 439.

JURISDICTION

Petitioner asserts jurisdiction under 28 U. S. C. 1257 (3) to review the judgment of the Supreme Court of South Carolina which was entered November 30, 1965, with rehearing denied December 14, 1965. The petition for Writ of *Certiorari*, limited to the jury question, was granted October 10, 1966.

QUESTION PRESENTED

Has petitioner, a Negro, established that members of his race were systematically excluded from the grand jury which indicted and the petit jury which convicted him?

STATEMENT

The petitioner was indicted, tried, and convicted of the murder of Sheriff C. W. Floyd of Jasper County at the February 1962 Term of the Court of General Sessions, and sentenced to death on March 1, 1962. An appeal from that court was affirmed by the Supreme Court of South Carolina on July 10, 1963. *State v. Bostick,* 243 S. C. 14, 131 S. E. (2d) 841.

A petition for a Writ of *Habeas Corpus* was denied by the Richland County Court of Common Pleas on July 3, 1964, and subsequently affirmed by the Supreme Court of South Carolina on November 30, 1965, rehearing denied December 14, 1965. *Bostick v. State,* 247 S. C. 22, 145 S. E. (2d) 439.

ARGUMENT

The evidence affirmatively shows that there was no discrimination by race in the selection of the grand jury which indicted and the petit jury which convicted petitioner.

Respondents acknowledge the decisions of this Court setting forth the principle that a defendant is denied the equal protection of the laws guaranteed by the Fourteenth Amendment if he is indicted by a grand jury or convicted by a petit jury from which members of his race have been systematically excluded because of their race. No attempt will be made here to cite, quote or paraphrase the dozens of such cases. Instead, respondents will cite three of the most recent decisions, which will suffice to show, by comparison, that there has been no discrimination against petitioner. Respondents further challenge the references to the evidence in the statement and argument portions of peti-

tioner's brief, and will show that such references are incomplete, taken out of context, and even misquoted.

Respondents refer to the cases of *Eubanks v. Louisiana*, 356 U. S. 584, 2 L. Ed. (2d) 991, 78 S. Ct. 970; *Arnold v. North Carolina*, 376 U. S. 773, 12 L. Ed. (2d) 77, 84 S. Ct. 1033; and *Swain v. Alabama*, 380 U. S. 202, 13 L. Ed. (2d) 759, 85 S. Ct. 824. The petitioner cites all three, and quotes from *Eubanks* and *Arnold*.

In *Eubanks* only one Negro was selected for grand jury service over a period of 18 years, during which 36 grand juries were picked, and it appeared that this one was mistakenly thought to be white. The evidence was that Negroes composed about one-third of the population, and a substantial part of the Negro population was qualified for jury service.

In *Arnold* only one Negro was chosen for the grand jury over a 24-year period, although the tax lists contained 12,250 white persons and 4,819 Negroes, with 5,583 white men and 2,499 Negro men listed for poll tax.

In *Swain*, where Negro males constituted 26 per cent of all males over 21 years of age, from 10 to 15 per cent of grand and petit jury panels were Negroes; Negroes served on 80 per cent of the grand juries in numbers from one to three; and there was an average of 6 to 7 Negroes on petit jury venires in criminal cases, although no Negro had served on a petit jury for 13 years. The Court held this not to be total exclusion, token inclusion, or *prima facie* invidious discrimination, and affirmed the judgment, while *Eubanks* and *Arnold* were reversed.

The evidence in the instant case is that in 1962, at the time of petitioner's conviction, there were approximately 974 white and 256 Negro qualified male electors in Jasper County (R. 81, 82). Thus, Negroes constituted about 21 per cent of the males qualified for jury service. This testimony was by the Clerk of the Registration Board. Under

South Carolina law (Section 38-52, 1962 Code of Laws) jurors are selected from the qualified male electors. This section of the law has been in effect since 1902, and was held in *Franklin v. South Carolina,* 218 U. S. 161, 54 L. Ed. 980, 30 S. Ct. 640, not to be discriminatory in its requirement that jurors be of good moral character, deemed qualified to serve, of sound judgment, and free from all legal exceptions. The principal restriction on this section is the requirement that two from every three electors who possess the constitutional requirements for jury service be selected. *State v. Jackson,* 240 S. C. 238, 125 S. E. (2d) 474. At the time of *Franklin,* the requirement was one out of three.

The testimony of R. L. Sensenbach, a jury commissioner, is that there were probably less than a thousand names placed in the jury box in December 1961 (R. 65). This was just prior to petitioner's trial, and somewhat less than 1000 would be in compliance with *Jackson, supra.*

Petitioner's statement on page 3 of his brief that only one Negro has served on the grand jury of Jasper County is incorrect. The testimony of R. L. Sensenbach (R. 71) was that he could not recall observing more than one Negro at one time. A fair reading of his testimony will show that Negroes have usually sat on the grand jury and that Negroes have been drawn for petit jury service in numbers from one to six. (R. 72.) It must be kept in mind that no more than forty petit jurors are drawn in Jasper County for a term of Court, and that no more than twelve grand jurors are drawn, since six grand jurors are held over from the previous year. (Section 38-61.1 and Section 38-401, *et seq.,* 1962 Code of Laws.)

Mr. Sensenbach's assertion (R. 64) that he knows 90 per cent of the Negroes by name must be taken with a grain of salt. He is an elected official, and no doubt does know a great many voters. The significance of his boast must be kept in context. If he were in fact discriminating

by keeping Negroes off the grand and petit juries, would he admit that he knows 90 per cent of the Negro males by name? It would appear that just the opposite would be true.

Jasper County has as many as six terms of Court each year (R. 67). Mr. Sensenbach was asked about the presence of Negroes on the grand and petit juries for the February term of the years 1958, 1959, 1960, and 1961 by petitioner. (R. 66, 67, 68.) He identified one Negro definitely and one possibly on the 1959 list (R. 67). He was not asked about the other terms of Court held during the year, and in fact was not asked by petitioner about the specific February 1962 term, during which he was convicted. It is agreed that one Negro was on the grand jury and two Negroes were on the petit jury venire.

This substantially meets the test of *Swain, supra.* It obviously is not exclusion, token inclusion, or invidious discrimination. Since it is proper for the term in question, what may have occurred in the past is immaterial. *Brown v. Allen,* 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397.

The testimony of Miss Evelyn Spivey, another member of the jury commission, is clear that an effort is made to secure two thirds of the qualified male electors without regard to race, and that there are substantial numbers of names of Negroes in the jury box. (R. 102-105.) Her testimony is succinct and clear and credible. In addition, it clears up, under petitioner's cross examination, the claim that a jury had been dismissed and an indictment quashed in 1954. Her testimony is that the indictment was quashed because of a question concerning a holdover grand juror, and had no connection with racial discrimination.

Petitioner's contention that some Negroes are disqualified for illiteracy is without merit, since whites are disqualified on the same basis. (R. 76.) Any disqualifications for illiteracy, white or Negro, are fully justified by the

discretion vested in the jury commission under Section 38-52, 1962 Code of Laws, and the decision of *Franklin v. South Carolina, supra.*

CONCLUSION

Respondents respectfully submit that the Writ of Certiorari should be dismissed as improvidently granted and the judgment of the Supreme Court of South Carolina affirmed.

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